

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “G”: NEW DELHI**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No. 2096/DEL/2019
Assessment Year: 2008-09**

M/s Triune Energy Services (P) Ltd., (earlier known as Saipem Triune Engineering (P) Ltd., Mohan Cooperative India Indl. Estate, Mathura Road, New Delhi-110044. PAN- AAKCS1045E	<u>Vs</u>	ACIT, Circle-7(1), New Delhi.
APPELLANT		RESPONDENT
Assessee represented by		Shri Gautam Jain, Adv. & Shri Ajit Jha, Adv.
Department represented by		Shri Yogesh Nair, Sr. DR
Date of hearing		15.06.2023
Date of pronouncement		21.06.2023

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has come in appeal against the order dated 26.12.2018 passed by the Commissioner of Income Tax (Appeals)-34, New Delhi (hereinafter referred as “learned First Appellate Authority” or in short “FAA”) in Appeal no. 356/14-15, for the assessment year 2008-09, arising out of the assessment order dated 22.12.2011u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred as the

“Act”), passed by the ACIT, Circle-7(1), New Delhi (hereinafter referred in short as “Ld. AO”).

2. Facts, in brief, are that assessee filed its return of income declaring income for current year at Rs. 24,70,705/- after setting off of unabsorbed depreciation for A.Y. 2006-07 amounting to Rs. 3,22,36,103/-. The case was selected for scrutiny and learned AO had made certain disallowances and additions to the extent of Rs. 13,80,75,520/-. Learned CIT(Appeals) had sustained additions on account of provision made on account of performance service incentives; non deduction of TDS on rent account; expenditure incurred n repairs & maintenance of lease-hold building; legal and professional expenses of international audit; and expenditure incurred on software purchases which have been challenged before this Tribunal by raising following grounds:

“1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding an addition of Rs. 58,30,399/- representing provision made on account of performance service incentives by holding the same to be an unascertained liability

2. That the learned Commissioner of Income Tax (Appeals) has also erred both in law and on facts in sustaining a disallowance of Rs. 27,00,677/- representing payment made on account of rent to landlord on the ground that no TDS has been deducted by the appellant company.

3. That learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in sustaining a disallowance of Rs. 46,12,757/- representing expenditure incurred on repair and maintenance on lease hold building and held to be capital expenditure.

4. *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining a disallowance of Rs. 50,000/- out of legal and professional expenses incurred wholly and exclusively for the purpose of business of the appellant company*

5. *That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining an addition of Rs. 16,99,448/- out of expenditure incurred on software by the appellant company.”*

3. Heard and perused the record. Ground-wise findings are as follows:

4. **Ground No. 1:** It may be appreciated that the learned AO had considered the provision under the head performance service incentive to be an unascertained liability. Learned DR has also argued that as it was not established that the employees had worked for twelve months so as to be entitled for incentive, the learned tax authorities were right in considering the provision being made for an unascertained liability.

4.1. In this context it can be appreciated from the submissions of learned counsel for the assessee that apart from the pay and emoluments to its employees, incentive was also to be given. However, when that was earned by the employee, the same became payable on completion of twelve months period. Thus, it was liability arising out of service contract and was part of pay and allowances of the employees. It is admitted case of the Revenue that during the subsequent years when payments were made of these incentives, the tax was deducted. At the same

time it is not disputed that these provisions were earlier allowed for A.Y. 2007-08 and subsequently for A.Y. 2009-10 onwards. The Bench is of the considered opinion that learned CIT(Appeals) has failed to appreciate that it was the contingent liability or an estimated provision as it was directly related to the performance of employees. The amount stood accrued to the employee for all purposes and on completion of continuous period of service it would merely become payable. It gave rise to a contingent liability. So a provision of that amount cannot be considered to be one for unascertained liability. At the same time, since this incentive was part of the pay and emoluments of the employee, TDS was supposed to be deducted only at the time of payment. Thus, the provision of non-deduction of TDS cannot be considered to be against the Act. Learned CIT(Appeals) has fallen in error in considering the same to be in the nature of bonus, which was not at all the case of the learned AO nor for which a specific query was raised at the appellate stage by the learned CIT(Appeals). Thus, the ground deserves to be allowed.

5. **Ground No. 2:** Factual aspects of this ground are that M/s Triune Projects Pvt. Ltd. had originally entered into an agreement with Sardar Manmohan Singh on 11.11.2003. The said lease agreement was for a period of five years. The business of Triune Projects in respect of design engineering business in oil and gas

industry was transferred to the assessee company vide agreement dated 22.09.2006 and the owner of the premises Sardar Manmohan Singh agreed to continue the lease for the premises with the possession being with the assessee company till the expiry of the lease period upto 11.11.2008. Accordingly, the assessee company made the payment to Triune Project for the rent paid by Triune Project to Sardar Manmohan Singh and the Triune Project deducted tax and also did not claim in its expenditure, while the assessee claimed it as an expenditure. The claim of learned AR is that in A.Y. 2007-08 no disallowance was made and in A.Y. 2009-10 disallowance has been deleted by learned CIT(Appeal). Learned AR has also submitted that payment was made to Triune Project in nature of reimbursement for which no tax was required to be deducted. It was also submitted that Triune Project had not claimed the same as expenditure.

5.1. Ld. DR however supported the findings of Ld. Tax authorities submitting that assessee was tenant and has show rent expenditure so assessee was supposed to make TDS.

5.2 In this context it can be appreciated that learned CIT(Appeals) has taken into consideration the fact that TPPL was separate entity and appellant cannot take benefit of the deduction of the TDS by third party. However, the fact is that assessee was not the tenant under the lease agreement dated 11.11.2003. What can be concluded is that assessee may be a sub-tenant qua the land-lord on the basis of

estoppels. The Bench is of the considered opinion as there is tri-partite transaction and TPPL is responsible for payment of Rent, so as per 194-IB of the Act, TPPL had liability to deducted the tax. The assessee was not making payment to the landlord/lessor but to actual lessee, TPPL, through whom assessee was in possession as sub-lessee thus the deduction of tax by TPPL met the mandate of law. Learned Tax authorities have failed to appreciate the aforesaid and accordingly ground raised is allowed.

6. **Ground No. 3:** In regard to this ground the facts are that a sum of Rs. 33,72,421/- was paid by the assessee to M/s Dreamwavers for interior work on basement; Rs. 5,24,996/- for building painting work; and Rs. 1,18,675/- for woodwork and painting. Learned tax authorities have considered the same to be lease-hold improvements of enduring nature and, therefore, held that assessee is entitled for depreciation and these expenditure are not of revenue nature.

6.1 Learned counsel for the assessee submits that tax authorities have failed to appreciate that the expenses were incurred on the day to day maintenance of the building which was in possession as lessee. Learned counsel relied on the judgments of Hon'ble Delhi High Court in **CIT vs. Hi Line Pens Pvt. Ltd. 306 ITR 182; CIT vs. Escorts Finance Ltd. 205 CTR 574 (Del); CIT Vs. Delhi Press Samachar Patra (P) Ltd. 322 ITR 590 (Del); and Instalment Supply Pvt.**

Ltd. Vs. CIT 149 ITR 52 (Del). It was also pointed out that the expenditure on repair & maintenance of building incurred in A.Y. 2009-10 was not disallowed in order of assessment framed u/s 143(3) of the Act.

6.2. Learned DR has supported the findings with the contention that from the record it appears that insurance claim was also raised so possibly there was fire etc. on account of which these expenses were essential. He pointed out there was demolition work so nature of repair was of enduring nature.

6.3. The Bench is of the considered view that the submissions of learned DR at this stage, of a case different than as set out by the learned tax authorities cannot be considered. At the same time, as discussed earlier in the determination of Ground no. 2, the assessee is found to be in possession of the premises with the consent of the land-lord under the lease agreement. There is nothing pointed out in the order of learned tax authorities that they have examined the lease agreement to conclude that expenditure brought benefit of enduring nature to assessee who was in possession under a lease agreement between the lessor Sardar Manmohan Singh and TPPL. Thus, the conclusion of learned tax authorities that the repairs or any interior work was of enduring nature and capital in nature is not supported by any cogent reasoning by way of examining nature of rights of the assessee in the premises. When assessee is enjoying the premises then the work in the nature of interior decoration and painting and woodwork cannot be considered to be of

enduring nature. These are all improvements involving temporary material and can be very well removed at the time of vacation of the premises. The ground is decided in favour of the assessee.

7. **Ground No. 4:** In regard to this ground it can be observed that provision of Rs. 50,000/- was made on account of audit fee payable for F.Y. 2006-07 and the same was claimed as revenue deduction. The said amount was claimed and was allowed in the assessment completed for the said assessment year. However, during the present assessment year the assessee made the payment against the bill raised by the auditors but instead of adjusting the same against the provision the expenses was debited to the P&L A/c. The appellant also reversed the amount of provision made in the preceding assessment year and credited the same to the P&L A/c. These facts have been made apparent by way of entries in regard to miscellaneous income, which are made available at page no. 60 of the Paper Book.

8.1 Learned DR has pointed out that reversal audit fee excess is shown at Rs. 1,00,000/-. He submitted there is lack of reconciliation.

7.2. Learned tax authorities have considered it to be prior period expenses and they have not crystallized during the year. However, what they failed to appreciate is that as the bill was raised by auditors the payment was made. Even otherwise when the provision was not disturbed in assessment of FY 2006-07, then in any

case when the provision was reversed in the present FY, that entitled assessee to debit the expenses in the present FY. Consequently, ground raised is sustained and is allowed.

8. **Ground No. 5:** Learned tax authorities have considered software licenses expenditure to be in the nature of perpetual licenses and having enduring benefit while denying the expenditure incurred on software purchase.

8.1. Learned DR has tried to convince the Bench on the basis of nature of software and bills that as they were used for many years after purchase so they have to be considered to be of perpetual license.

8.2. The law in regard to same stands crystallized that the Expenditure on 'Application Software' is revenue. Reliance is rightly place by Ld. Counsel on following judgement;

- CIT v. **Asahi India Safety Glass Ltd.** 346 ITR 329 (Del);
- CIT v. **Amway India Enterprises** 346 ITR 341 (Del);
- CIT v. **ACL Wireless Ltd.** 261 ITR 210 (Del);
- CIT v. **G.E. Capital Services** 300 ITR 420 (Del);
- CIT v. **Raychem RPG Ltd.** 346 ITR 138 (Bom).

8.3. It is also relevant to mention that claim was allowed in A.Y. 2007-08 U/s 143(3) and in AY 2009-10 the same has been deleted at the stage of learned first appellate authority. In the light of aforesaid, the ground is sustained.

9. As a consequence of aforesaid determination of the grounds in favour of the appellant, **the appeal stands allowed.**

Order pronounced in open court on 21.06.2023.

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER
MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI